

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
THE CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143**

PETITIONER:

Employer Account No. - 2484881
PLURAL ENTERTAINMENT INC
ATTEN: CESAR T MATA, FINANCE & ACCTG
MANAGER
4000 NE 36TH AVENUE
MIAMI FL 33142-4210

RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC
OPPORTUNITY
c/o Department of Revenue

**PROTEST OF LIABILITY
DOCKET NO. 2012-27381L**

ORDER

This matter comes before me for final Department Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated January 18, 2012, is AFFIRMED.

JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY*] en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt Lòd sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **September, 2012.**



Altemese Smith,
Assistant Director,
Reemployment Assistance Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

Shanendra Y. Barnes

DEPUTY CLERK

DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the _____ day of September, 2012.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Reemployment Assistance Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

PLURAL ENTERTAINMENT INC
ATTEN: CESAR T MATA, FINANCE &
ACCTG
MANAGER
4000 NE 36TH AVENUE
MIAMI FL 33142-4210

JULIO MERIDA
5671 NW 187TH STREET
MIAMI GARDENS FL 33055

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1-4857
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DOR BLOCKED CLAIMS UNIT
ATTENTION MYRA TAYLOR
P O BOX 6417
TALLAHASSEE FL 32314-6417

State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
 MSC 347 CALDWELL BUILDING
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RESPONDENT:

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PROTEST OF LIABILITY
DOCKET NO. 2012-27381L

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
 Interim Executive Director,
 Reemployment Assistance Services
 DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated January 18, 2012.

After due notice to the parties, a telephone hearing was held on July 9, 2012. The Petitioner, represented by the Petitioner's Finance and Accounting Manager, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were not received.

Issue:

Whether services performed for the Petitioner by the Joined Party and other individuals working as cameramen constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

Findings of Fact:

1. The Petitioner is a movie studio which produces both movies and television productions. The Petitioner has been in business since approximately 2003 and established liability for payment of unemployment compensation taxes effective July 1, 2003.
2. The Petitioner's witness, the Finance and Accounting Manager, was hired by the Petitioner as an employee in October 2011. The Finance and Accounting Manager was informed by the Petitioner

that the Joined Party worked for the Petitioner as a cameraman from November 16, 2010, until September 14, 2011, and that the Petitioner classified the Joined Party as an independent contractor. It is the belief of the Finance and Accounting Manager that all of the cameramen who have performed services for the Petitioner since the inception of the business have been classified by the Petitioner as independent contractors.

3. There was no written contract or agreement between the Petitioner and the Joined Party. The Joined Party worked under the same terms and conditions as all of the other cameramen who perform services for the Petitioner.
4. The Joined Party worked at the Petitioner's film studio based on a schedule established by the Petitioner. The Petitioner provided the cameras which were used by the Joined Party and the other cameramen.
5. The Producer, who is an employee of the Petitioner, told the Joined Party how to perform the work.
6. The Joined Party was paid twice a month based on a monthly amount. During most months the Joined Party's pay was \$4,000, although the amount varied during some months. The pay was determined by the Petitioner using an hourly or daily rate as a guide. The Petitioner determined the amount of pay at the beginning of each month based on the production schedule for the month. The Joined Party was paid for sick days and for holidays. No taxes were withheld from the pay. In January 2012 the Finance and Accounting Manager reported the Joined Party's earnings for 2011 on Form 1099-MISC.
7. The Joined Party was not allowed to work for a competitor of the Petitioner.
8. The Joined Party filed a claim for unemployment compensation benefits effective October 2, 2011. When the Joined Party did not receive credit for his earnings with the Petitioner a *Request for Reconsideration of Monetary Determination* was issued and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services as an employee or as an independent contractor.
9. On January 18, 2012, the Department of Revenue determined that the Joined Party and other individuals performing services for the Petitioner as cameramen are the Petitioner's employees retroactive to November 16, 2010. The Petitioner filed a timely protest.

Conclusions of Law:

10. The issue in this case, whether services performed for the Petitioner by the Joined Party and other individuals as cameramen constitute employment subject to the Florida Unemployment Compensation Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(a)2., Florida Statutes, provides that employment subject to the chapter includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.
11. The Supreme Court of the United States held that the term "usual common law rules" is to be used in a generic sense to mean the "standards developed by the courts through the years of adjudication." United States v. W.M. Webb, Inc., 397 U.S. 179 (1970).
12. The Supreme Court of Florida adopted and approved the tests in 1 Restatement of Law, Agency 2d Section 220 (1958), for use to determine if an employment relationship exists. See Cantor v. Cochran, 184 So.2d 173 (Fla. 1966); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956); Magarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So.2d 1061 (Fla. 2d DCA 1987). In Brayshaw v. Agency for Workforce Innovation, et al; 58 So.3d 301 (Fla. 1st DCA 2011) the court stated that the statute does not refer to other rules or factors for determining the employment relationship and, therefore, the

Department is limited to applying only Florida common law in determining the nature of an employment relationship.

13. Restatement of Law is a publication, prepared under the auspices of the American Law Institute, which explains the meaning of the law with regard to various court rulings. The Restatement sets forth a nonexclusive list of factors that are to be considered when judging whether a relationship is an employment relationship or an independent contractor relationship.
14. 1 Restatement of Law, Agency 2d Section 220 (1958) provides:
 - (1) A servant is a person employed to perform services for another and who, in the performance of the services, is subject to the other's control or right of control.
 - (2) The following matters of fact, among others, are to be considered:
 - (a) the extent of control which, by the agreement, the business may exercise over the details of the work;
 - (b) whether or not the one employed is engaged in a distinct occupation or business;
 - (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
 - (d) the skill required in the particular occupation;
 - (e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
 - (f) the length of time for which the person is employed;
 - (g) the method of payment, whether by the time or by the job;
 - (h) whether or not the work is a part of the regular business of the employer;
 - (i) whether or not the parties believe they are creating the relation of master and servant;
 - (j) whether the principal is or is not in business.
15. Comments in the Restatement explain that the word "servant" does not exclusively connote manual labor, and the word "employee" has largely replaced "servant" in statutes dealing with various aspects of the working relationship between two parties.
16. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1st DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1st DCA 1983), the court acknowledged that the question of whether a person is properly classified an employee or an independent contractor often can not be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.
17. There was no written agreement or contract between the Petitioner and the Joined Party. The Finance and Accounting Manager was not the individual who hired the Joined Party as a cameraman. Thus, no competent evidence has been provided concerning any verbal agreement. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "In the event that there is no express agreement and the intent of the parties can not be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."
18. The Petitioner's business is to produce movies and television shows. The Joined Party worked for the Petitioner as a cameraman and was told what to do by the producer, an employee of the Petitioner. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was a necessary and integral part of the Petitioner's business.

19. The Petitioner provided the studio and the cameras. It was not shown that the Joined Party was required to provide anything which was necessary to perform the work. It was not shown that the Joined Party had any expenses in connection with the work. It was not shown that the Joined Party had any investment in a business or that the Joined Party performed services for others while working for the Petitioner.
20. The Joined Party performed services exclusively for the Petitioner from November 16, 2010, through September 14, 2011. That fact reveals a relationship of relative permanence.
21. The evidence reveals that the Joined Party was paid by time worked, using an hourly or daily rate as a guide, rather than by production or by the job. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.
22. The evidence reveals that the Petitioner controlled what work was performed, when it was performed, where it was performed and how it was performed. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that if the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor. If the person serving is subject to the control of the person being served as to the means to be used, he is not an independent contractor. It is the right of control, not actual control or interference with the work which is significant in distinguishing between an independent contractor and a servant. The Court also determined that the Department had authority to make a determination applicable not only to the worker whose unemployment benefit application initiated the investigation, but to all similarly situated workers.
23. The Petitioner's witness, the Finance and Accounting Manager, testified that he had never met the Joined Party and that his testimony was based on what he had been told by the producer. Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. Information or evidence received from other people and not witnessed firsthand is hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions. Section 120.57(1)(c), Florida Statutes.
24. Rule 73B-10.035(7), Florida Administrative Code, provides that the burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.
25. The testimony and evidence presented by the Petitioner does not show that the determination of the Department of Revenue was in error.

Recommendation: It is recommended that the determination dated January 18, 2012, be AFFIRMED.

Respectfully submitted on July 13, 2012.

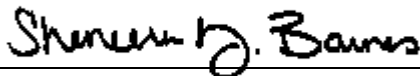


R. O. SMITH, Special Deputy
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envío por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke *Lòd Rekòmande* a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd ken z jou apati de dat ke *Lòd Rekòmande* a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:

July 13, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

JULIO MERIDA
5671 NW 187TH STREET
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DEPARTMENT OF REVENUE
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DOR BLOCKED CLAIMS UNIT
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